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IN THE

Supreme Court of the United States

October Term, 1970.
No. 63

GROVE PRESS, INC., HOWARD WAGONHEIM & 5 WEST AMUSEMENT CO., INC.,

Appellants,

vs.

MARYLAND STATE BOARD OF CENSORS,

Appellee.

On Appeal From the Court of Appeals of Maryland.

MOTION FOR LEAVE TO FILE BRIEF WITH BRIEF ANNEXED AS AMICUS CURIAE FOR ADULT FILM ASSOCIATION OF AMERICA, INC.

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MOTION OF ADULT FILM ASSOCIATION OF AMERICA, INC. FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

The Adult Film Association of America asks leave to file the annexed Brief as *amicus curiae* in this case. Appellants have consented to the filing of this amicus curiae brief, but appellee has refused its consent.

The Adult Film Association of America is a membership corporation consisting of producers, distributors and exhibitors of motion picture film, directed primarily at adult audiences.

Amicus curiae has a substantial interest in the determination of the issues presented by this case. *Amicus* is unalterably opposed to censorship, believing it to be the sworn enemy of freedom and liberty. The Asso-

ciation is deeply committed to the principles of freedoms of speech and press upon which our country was built and prospered.

Because the films produced, distributed and exhibited by Association members find their way into every corner of our country, *amicus* is concerned with the standard pursuant to which its films may be judged. *Amicus* believes that the standard should be the one foreshadowed in *Redrup* and *Stanley*, namely that theatre exhibitors should be free to exhibit even "obscene" films to consenting adults, provided the privacy of the general public is not invaded.

Amicus also believes that this Court should reaffirm its "ceaseless vigilance" to prevent the erosion of First Amendment rights by the States in the name of regulating or suppressing obscenity.

It is, therefore, respectfully requested the Adult Film Association of America be granted leave to file a brief *Amicus Curiae*.

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SAM ROSENWEIN,
Of Counsel.

BRIEF AMICUS CURIAE FOR ADULT FILM ASSOCIATION OF AMERICA, INC.

Interest of the Amicus.

The interest of the *amicus* is set forth in the Motion for Leave to file this Brief.

ARGUMENT.

I.

Obscenity Is Protected by the Free Speech and Press Provisions of the First and Fourteenth Amendments, and May Only Be Regulated or Suppressed in the Interest of Legitimate State Interests, Such as Protecting Minors and Protecting the Privacy of the General Public.

The August 6, 1970 issue of the Los Angeles Times (Part 1, p. 5), announced that the Presidential Commission on Obscenity and Pornography had concluded that:

> "Research indicates that erotic materials do not contribute to the development of character deficits, nor operate as a significant factor in antisocial behavior or in crime and delinquency causation."[1]

[1]The Commission was established by Congress in Public Law 90-100. A Progress Report to the Congress and to the President was issued in July 1969. This Progress Report is referred to in the Brief *Amici Curiae* of National General Corp., et al. in *Byrne v. Karalexis,* October Term, 1969, No. 1149, Addendum, p. 3. The Chairman of the Commission is William B. Lockhart, Dean of the Minnesota Law School. Another member of the Commission is Charles H. Keating, Jr., founder of the Citizens for Decent Literature. The activities of that group were discussed by the petitioners in *Redrup v. New York* and *Austin v. Kentucky,* 386 U.S. 767, in reply to the *amicus curiae* brief filed by the Citizens for Decent Literature. According to the Los Angeles Times story, "the draft report has been leaked to a House sub-committee trying to line up expert witnesses to challenge [the Commission's] findings at hearings next week."

There is no evidence, the Report concluded, "that exposure to pornography operates as a cause of misconduct in either youths or adults".

A subsequent Associated Press story states that "the Commission will suggest the repeal of all federal, state and local laws against showing and selling pornographic films and other materials to adults". According to the Associated Press, the Report states "it is exceedingly unwise to attempt to legislate individual moral values and standards". Los Angeles Times, August 9, 1970 (Sec. A., p. A). The same edition of the Los Angeles Times (Sec. G., p. 3) carries a story titled "Denmark and Pornography", which quotes the following statement by Karen Horens, the tenth woman minister to be ordained in the Danish Lutheran Church:

> "I'm convinced access to pornography is an excellent thing for the lonely and aged. And I'm sure that it's just now with the new freedom that we're going through a crude period. With time the quality will improve. . . . Mothers, friends of mine, tell me about their teen-age sons bringing home porno magazines and leaving them lying around the house. They're not ashamed about them, and this I think is a good thing. Many teenagers, including those in my confirmation class, aren't ashamed about knowing about pornography, but they do have a certain distaste for it. Maybe we're going to be in for a back-lash from this next generation. That would be truly a pity.
>
> "Basically, though, as far as pornography is concerned I feel, well, now that's out of the way, let's get on to the real problems: old age, the woman in the home."

The forthcoming Presidential Report, which follows two years of study, appears to be an appropriate occasion to re-examine the doctrine that obscenity is not speech and therefore is not protected by the First and Fourteenth Amendments to the United States Constitution.[2]

A. Twenty-one years ago, in *Commonwealth of Pennsylvania v. Gordon, et al.*, 66 D&C 101 (1949), Judge Curtis Bok argued that "obscenity" was sex speech entitled to protection under the First and Fourteenth Amendments in the same fashion as other controversial speech. Accordingly, he stated that a work dealing with sex could not constitutionally be condemned unless it presented a clear and present danger of serious social harm. He also expressed doubt that any antisocial action follows exposure to obscene material, a view apparently shared by the Presidential Commission.

Seven years later, in *United States v. Roth,* 237 F. 2d 796 (2 Cir. 1956), Judge Frank, in a concurring opinion, paid his respects to Judge Bok, stating that before reading Judge Bok's opinion he "had little doubt about the validity of a purely punitive obscenity statute. . . . [Judge Bok's] brilliant opinion, which states

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[2]Judge Irving Kaufman, after observing that the Court held in *Roth* that obscenity is not speech, stated: "If obscenity is not speech then what is it? I would not be giving away a big secret to state that efforts to make *that* determination have not been remarkably successful up until now. I am certainly not attempting to have any fun at the Supreme Court's expense. I cannot myself offer anything of value toward formulating that inconceivably difficult definition. . . . Given the complexity of both communication and people, such a definition—of obscenity—may be beyond the power of discursive language." 11 Annual James Madison Lecture, New York Law Journal, April 1, 1970 (emphasis in original).

arguments that (so far as I know) have never been answered, nudged me into the skeptical views contained in this opinion and the Appendix." (237 F. 2d at 805-806).

Judge Frank urged a re-examination of the obscenity question in light of the expanding freedom afforded speech by this Court in other areas.

> ". . . I think it not improper to set forth, as I do in the Appendix, considerations concerning the obscenity statute's validity with which, up to now, I think the Supreme Court has not dealt in any of its opinions. I do not suggest the inevitability of the conclusion that that statute is unconstitutional. I do suggest that it is hard to avoid that conclusion, if one applies to that legislation the reasoning the Supreme Court has applied to other sorts of legislation. Perhaps I have overlooked conceivable compelling contrary arguments. If so, maybe my Appendix will evoke them." (237 F. 2d at 804).

B. In *Roth-Alberts*, this Court rejected Judge Frank's approach and charted a different course. Essentially, the Court held "that obscenity is not protected by the freedoms of speech and press", guaranteed by the First and Fourteenth Amendments (354 U.S. at 81). In rejecting the First Amendment argument, the Court said:

> "It is strenuously urged that these obscenity statutes offend the constitutional guarantees because they punish incitation to impure sexual *thoughts*, not shown to be related to any overt anti-social conduct which is or may be incited in the persons stimulated to such *thoughts*. . . It is

insisted that the constitutional guaranties are violated because convictions may be had without proof either that obscene material will perceptibly create a clear and present danger of antisocial conduct, or will probably induce its recipients to such conduct. But, in light of our holding that obscenity is not protected speech, the complete answer to this argument is in the holding of this Court in Beauharnais v. People of State of Illinois, supra, 343 U.S. at page 266, 72 S.Ct. at 735:

> 'Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase "clear and present danger." Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class.'" (354 U.S. at 487) (emphasis in original).

Beauharnais was significantly undermined in *New York Times Co. v. Sullivan*, 376 U.S. 254, and its progeny. Mr. Justice Brennan there held that the Court would not grant or deny First Amendment protection because of "mere labels".

> ". . . Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." (376 U. S. at 269).

Commenting on this case, Professor Harry Kalven, Jr. said:

> ". . . No matter how speech is classified, there must still be First Amendment consideration and review. No category of speech is any longer beneath the protection of the First Amendment. Had the *Times* case preceded *Roth,* for example, *Roth* could not have been written the way it was, although the decision might have been the same. Obscenity, too, it would seem, 'can claim no talismanic immunity from constitutional limitations.'
>
> "The special logic of *Chaplinsky, Beauharnais,* and *Roth* may well disappear now that the *Times* opinion is on the books. . . ." (Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment", The Supreme Court Review, 191, 217-218 [1964]).

In addition to relying on the authority of *Beauharnais v. Illinois,* 343 U.S. 250, *Roth* was keyed to the "social value" test. ". . . [I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." (254 U.S. at 484).

Mr. Justice Brennan, writing in the Harvard Law Review,[3] amplified this view, stating:

> "As I said, the absolute view has not prevailed within the Court. A majority of the Justices from time to time have recognized some contexts in which government has power to curb speech as such. One view is that the first amendment ren-

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[3]Brennan, Wm. J., "The Supreme Court and the Meiklejohn Interpretation of the First Amendment", 79 Harv. L. Rev. 1, 5-6 (1965).

> ders immune from regulation only speech that has 'redeeming social importance.' The stated ground of this view is that, although all ideas having even the slightest redeeming social value—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees, implicit in the history of the first amendment is the rejection of speech that is utterly without redeeming social importance. Thus, certain forms of speech—notably obscenity—deemed not to have redeeming social value, are not protected against laws that punish or suppress them. . . ."

In *Stanley v. Georgia,* 394 U.S. 557, 564, Mr. Justice Marshall, citing *Winters v. New York,* 333 U.S. 507, 510, emphasized the First Amendment right to receive information and ideas, *regardless of their social worth.* In *Winters,* the Court said:

> ". . . We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. . ."

Subsequently, again citing *Winters v. New York,* Mr. Justice Marshall said: "Nor is it relevant that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological

content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." (394 U.S. at 566).

C. It thus appears that both of the propositions upon which *Roth* rested have been undermined by subsequent decisions of the Court. Neither *Beauharnais v. Illinois* nor the "social value" test presently support the proposition that obscenity is not speech and is, therefore, unprotected by the First and Fourteenth Amendments.

The emerging doctrine that obscenity is protected, absent exposure to minors or to an unwilling audience, was initially suggested in *Redrup v. New York,* 386 U.S. 767, 770:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. . . . In none was there any suggestion of an assault upon individual privacy or publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. . . . And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31."

Redrup was made more explicit in *Stanley v. Georgia.* In *Stanley,* the Court rejected the unqualified statement in *Roth* "that obscenity is not protected by the First

Amendment" (394 U.S. at 560). Properly understood, "*Roth* and its progeny . . . mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity" (394 U.S. at 563). A valid governmental interest exists where children are concerned, or where there is an invasion of the privacy of the general public (394 U.S. at 567). Thus limited, *Roth* remains unimpaired (394 U.S. at 568).

From *Roth* to *Stanley* is twelve years. Over that period, the Court, with Herculean effort, has attempted to provide guide-lines pursuant to which this Court, and lower courts, might curtail "obscenity" without impairing freedom of speech and press. The effort has not proved successful. Experience demonstrates, it is respectfully submitted, not only that the task may be beyond the power of the legal process, but also that inevitably the legal regulation of obscenity "curtailed discussion of important moral and artistic issues" and that this suppression "forecloses one of the main thoroughfares for the changing of moral and artistic view".[4]

Recognition by this Court that "obscenity" is protected by the free speech and press provisions of the First and Fourteenth Amendments has, of course, broad implications. As Mr. Justice Brennan observed,[5] a shift in the basic philosophy of law results in an epoch-making difference in the way court cases are decided. The findings of the Presidential Commission on Obscen-

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[4]Katz, Al "Free Discussion v. Final Decision: Moral and Artistic Controversy and the Tropic of Cancer Trials, 79 Yale Law Journal 208, 209.

[5]Brennan, *op. cit.*, p. 10.

ity and Pornography and the holding in *Stanley v. Georgia* mark a shift in the law's philosophy, as it applies to obscenity. This shift, it is respectfully submitted, will not only benefit society at large, but will also benefit the judicial system. The shift will free this Court from the thankless and onerous task of acting as the "super-censor" of the Nation. It will also relieve our over-crowded court system[6] and make it possible for the courts to take on new litigation stemming from such pressing problems as pollution and consumer suits.

II.

This Court Must Continue Its "Ceaseless Vigilance" to Prevent the Erosion of Constitutional Rights by the States.

Even in the beginning it was recognized that exclusion of obscenity from First Amendment protection created serious dangers to constitutional guarantees. Accordingly, the Court stated in *Roth* (354 U.S. 476, 488):

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring

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[6]In *Jacobellis v. Ohio*, 378 U.S. 184, 199-200, Chief Justice Warren said: "[O]bscenity cases continue to come to this Court, and it becomes increasingly apparent that we must settle as well as we can the question of what constitutes 'obscenity' and the questions of what standards are permissible in enforcing proscriptions against obscene matter. . . . [M]ost of our decisions since *Roth* have been given without opinion and have thus failed to furnish [adequate] guidance. Nor does the Court in the instant case—which has now been twice argued before us—shed any greater light on the problem. . . ."

federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. . . ."

Over the years, the Court has had occasion—some would say too much occasion—to keep the door "tightly closed" to prevent intrusion upon constitutionally protected works dealing with sex.[7]

Today, the Court is again being asked to protect a challenged work, a film entitled "I Am Curious-Yellow". This film was found to have redeeming social value and not to appeal to prurient interest by the Court of Appeals for the Second Circuit. *United States*

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[7] *Hoyt v. Minnesota*, 90 S. Ct. 2241; *Walker v. Ohio*, 90 S. Ct. 1884; *Bloss v. Dykema*, 90 S. Ct. 1727; *Cain v. Kentucky*, 90 S. Ct. 1110; *Carlos v. New York*, 90 S. Ct. 395; *Henry v. Louisiana*, 392 U.S. 655; *Felton v. Pensacola*, 390 U.S. 340; *Robert-Arthur Management Corp. v. Tennessee*, 389 U.S. 578; *I. M. Amusement Corp. v. Ohio*, 389 U.S. 573; *Chance v. California*, 389 U.S. 89; *Central Magazine Sales, Ltd. v. United States*, 389 U.S. 50; *Potomac News Co. v. United States*, 389 U.S. 47; *Connor v. City of Hammond*, 389 U.S. 48; *Schackman v. California*, 388 U.S. 454; *Cobert v. New York*, 388 U.S. 443; *Ratner v. California*, 388 U.S. 442; *Avansino v. New York*, 388 U.S. 446; *Rosenbloom v. Virginia*, 388 U.S. 450; *Sheperd v. New York*, 388 U.S. 444; *Mazes v. Ohio*, 388 U.S. 453; *Friedman v. New York*, 388 U.S. 441; *Keney v. New York*, 388 U.S. 440; *Corinth Publications, Inc. v. Wesberry*, 388 U.S. 448; *Quantity of Copies of Books v. Kansas*, 388 U.S. 452; *Books, Inc. v. United States*, 388 U.S. 449; *Aday v. United States*, 388 U.S. 447; *Gent v. Arkansas*, 386 U.S. 767; *Austin v. Kentucky*, 386 U.S. 767; *Redrup v. New York*, 386 U.S. 767; *Memoirs v. Massachusetts*, 383 U.S. 413; *Tralins v. Gerstein*, 378 U.S. 576; *Grove Press, Inc. v. Gerstein*, 378 U.S. 577; *Jacobellis v. Ohio*, 378 U.S. 184; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Kingsley Int'l. Pic. Corp. v. Regents*, 360 U.S. 684; *Sunshine Book Co. v. Summerfield*, 355 U.S. 372; *One, Inc. v. Olesen*, 355 U.S. 371; *Times Film Corp. v. Chicago*, 365 U.S. 43.

v. A Motion Picture Entitled "I Am Curious-Yellow", 404 F. 2d 196 (2 Cir. 1968). This conclusion is plainly mandated by decisions of this Court.[8]

Amicus is deeply concerned lest the Court, disturbed by the charge that it is acting as "super-censor", abnegate its responsibility to protect constitutional rights by following the suggestion repeatedly made by Mr. Justice Harlan that a State has virtually unfettered discretion to determine the reach of the First Amendment within its own borders. *Amicus'* uneasiness flows from the fact that this view has tentatively won new adherence. *Hoyt v. Minnesota*, 90 S. Ct. 2241; *Walker v. Ohio*, 90 S. Ct. 1884; *Bloss v. Dykema*, 90 S. Ct. 1727; *Cain v. Kentucky*, 90 S. Ct. 1110; *Carlos v. New York*, 90 S. Ct. 395.

It is understandable why it would be appealing to leave the obscenity question in the hands of the States, thus removing the Court from this "constitutional disaster area". In 1959, Mr. Justice Harlan, concurring in *Kingsley International Picture Corporation v. Regents of N.Y.U.*, 360 U.S. 685, 707-708, said:

> "Giving descriptive expression to what in matters of this kind are in the last analysis bound to be but individual subjective impressions, objec-

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[8]See cases collected in note 7.

In *United States v. 10 reels MOTION PICTURE FILM entitled "Quiet Days in Clichy" etc.*, 90 S. Ct. 2227, this Court, after viewing the film "Quiet Days in Clichy", denied without prejudice petitioner's application to vacate a stay. Following this ruling the Honorable William P. Gray found the film to be not obscene. *United States v. 10 reels MOTION PICTURE FILM entitled "Quiet Days in Clichy" etc.*, United States District Court for the Central District of California, Civil No. 70-1116-WPG (July 10, 1970). A copy of Judge Gray's Findings of Fact and Conclusions of Law is attached hereto as APPENDIX A.

tively as one may try to discharge his duty as a judge, is not apt to be repaying. I shall therefore content myself with saying that, according full respect to, and with, I hope, sympathetic consideration for, the views and characterizations expressed by others, I . . . think that in banning this film New York has exceeded constitutional limits."

Nine years later, Justice Harlan observed that the subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication (Concurring opinion in *Ginsberg v. New York*, and dissenting opinion in *Interstate Circuit v. Dallas*, 390 U.S. 676, 704.):

"The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment. From the standpoint of the Court itself the current approach has required us to spend an inordinate amount of time in the absurd business of perusing and viewing the miserable stuff that pours into the Court, mostly in state cases, all to no better end than second-guessing state judges. . . ."

Justice Harlan saw "no improvement in this chaotic state of affairs", unless "it is recognized that this whole problem is primarily one of state concern" (390 U.S. at 707).

In *Jacobellis*, Justice Brennan rejected the temptation to leave the final decision to the state courts (378 U.S. at 187-188):

". . . The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and

unpleasant task. But we cannot accept. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection the question whether a particular work is obscene necessarily implicates an issue of constitutional law. . . . Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case. . . .'"

After observing that in other areas involving constitutional rights, the Court has recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case, Mr. Justice Brennan stated (378 U.S. at 189-190):

"'. . . We cannot understand why the Court's duty should be any different in the present case, where Jacobellis has been subjected to a criminal conviction for disseminating a work of expression and is challenging that conviction as a deprivation of rights guaranteed by the First and Fourteenth Amendments. Nor can we understand why the Court's performance of its constitutional and judicial function in this sort of case should be denigrated by such epithets as 'censor' or 'supercensor.' In judging alleged obscenity the Court is no more 'censoring' expression than it has in other cases 'censored' criticism of judges and public officials, advocacy of governmental overthrow, or speech alleged to constitute a breach of the peace. Use of an opprobrious label can neither obscure

nor impugn the Court's performance of its obligation to test challanged judgments against the guarantees of the First and Fourteenth Amendments and, in doing so, to delineate the scope of constitutionally protected speech. Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected."

Professor Herbert Wechsler recently observed that a national standard—rather than a local one—was necessary to keep "the local bigot within decent bounds" (46 Virginia Quarterly Review 369, 382 [1970]). The limitless reach of the local bigot is made clear in the dissenting opinion of Chief Justice Warren in *Times Film Corp. v. Chicago*, 365 U.S. 43, 68-72. See also, Lockhart and McClure, "Literature, The Law of Obscenity, and the Constitution", 38 Minn. L. Rev. 298. After observing that censorship of obscenity has almost always been irrational and indiscriminate, Lockhart and McClure cite a number of examples, including the classic from Georgia, where the Chairman of the State Literature Commission stated: "I don't discriminate between nude women, whether or not they are art. It's all lustful to me." (*Id.*, at pp. 302-320).

Sometimes a local censor moves because of political opportunism; sometimes from religious fervor. The political motivation emerges clearly enough from the following news story appearing in the August 3, 1970 issue of Daily Variety:

"'I am Curious (Yellow)' cropped up as an issue in the primary election in Kansas to be held [August 4]. James Bouska, Johnson County prosecuting attorney who zeroed in on showing of the picture at the Kimo South Theatre in Overland Park last year, has billed himself as 'the first prosecuting attorney in the U.S. to block the showing of the controversial movie, 'I Am Curious (Yellow)'

"He is addressing the issue in his campaign platform 'as a public servant and parent.' He is a Republican seeking post of state Attorney General."

Religious overtones are found in a recent decision of the Honorable Harry Lathrop in the case of *Minnesota v. Getman*, Municipal Court, City of Duluth, Minnesota, No. 62013, unreported (July 27, 1970). Judge Lathrop, after observing that there has been much argument as to how to determine contemporary community standards, said:

". . . In any society, the development of which has been influenced and conditioned by any one of the great religions of the world, it is not difficult to determine such standards. . . . In the United States, where the Judeo-Christian ethics predominate, there is no mystery as to what contemporary community standards are. No one can deny that it was primarily the Judeo-Christian ethics which influenced and motivated the architects of our great Constitution in its drafting and adoption and which they applied to government

> and their daily lives. . . . Paul in his epistle to the Thessalonians gave us the rule and guide to follow in matters relating to sex.
>
> . . . It is from these Biblical sources that the people of this great country of ours have derived the standards of morality and conduct by which the vast majority of us live. It is by these standards that the vast majority of our citizens measure obscenity."

In *Gent v. Arkansas,* 239 Ark. 474, 393 S.W. 2d 519 (1965), Chief Justice Harris held that the City of Pine Bluff, Arkansas was the proper area to determine whether the magazines there involved were protected by the First Amendment. He said:

> "Perhaps we lack sophistication, but, to us, articles, which, for example, indicate that our colleges are simply play-grounds for the indulgence of sexual pleasures, are completely obscene, and totally without any redeeming features. Of course, we are not cognizant of the standards of Washington, New York, Chicago, or San Francisco, nor is there any way for us to know the 'standard' of the nation at large, but we think that evidence clearly established that the contents of the magazines in question are not compatible with the contemporary community standards in Pine Bluff, Arkansas."

In reversing, this Court held that the magazines could not be condemned under any constitutional standard. *Gent v. Arkansas,* 386 U.S. 767.

It should be remembered that the governmental structure of the United States includes, in addition to the Federal Government and the fifty States, a total of 13,049 counties, 18,048 municipalities and 17,015 townships. United States Bureau of the Census: Statistical Abstract of the United States, 1969, p. 405.

If a film can be denied First Amendment protection because it does not meet the community standards of Oshkosh, or because it appeals to the prurient interest of the people in the City of Pine Bluff, or is deemed to be utterly without redeeming social value in Tuscaloosa, the First Amendment is dead for all practical purposes, at least where material is challenged as obscene. In *United States v. Klaw*, 350 F. 2d 155 (2 Cir. 1965), the Court recognized the serious threat to freedom of expression implicit in giving free rein to local communities to exclude from the First Amendment what they do not like (350 F. 2d at 170):

> ". . . While there is some merit to the opinion of those who say that appellate courts should not have to sit as a board of censors supervising the work of the police, the motion picture censorship bureaus, the schools, the churches and other organizations that have their lists of good and bad books and motion pictures, there is even more merit to the view that once these preferences are enforced upon others, we 'cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected' . . . Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity."

Conclusion.

What emerges from the above is that something decisive must be done to solve the obscenity dilemma. One solution, and one fraught with danger, is for the Court to withdraw from the arena and let local censors run rampant. This, of course, would be an abnegation of this Court's sworn duty to protect constitutional rights. The other approach is for the Court to clearly hold that obscenity is speech, protected by the First and Fourteenth Amendments, and subject to regulation only to protect important legitimate societal interests. This course, it is submitted, is the one that will best secure freedom, as guaranteed by the First Amendment and respect the proper interests of the States.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Amicus Curiae, for Adult Film Association of America, Inc.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. 10 reels Motion Picture Film entitled "Quiet Days in Clichy" from Book by Henry Miller, Defendant. Grove Press, Inc., a New York corporation, Claimant. Civil No. 70-1116-WPG.

This matter coming on for trial before the Honorable William P. Gray, Judge Presiding, without a jury, a jury having been waived, plaintiff appearing by its attorneys, Robert L. Meyer, United States Attorney, Frederick M. Brosio, Jr., Assistant U. S. Attorney, Chief of Civil Division, by Larry L. Dier, Assistant U. S. Attorney, and defendant and claimant appearing by their attorney, Stanley Fleishman.

The Court having heard the case and being duly advised now makes its findings of fact and conclusions of law.

FINDINGS OF FACTS

I

On May 2, 1970 two complete prints of the motion picture film "Quiet Days in Clichy" were imported into the commerce of the United States on behalf of claimant Grove Press, Inc.

II

The film is based upon a book by Henry Miller, by the same name, and it is a faithful translation of the book.

III

The book was published in the United States by Grove Press, Inc. in 1965. It has freely circulated

throughout the United States for approximately five years without the plaintiff ever charging that the book was obscene.

IV

The motion picture film "Quiet Days in Clichy" has been reviewed by Variety, a trade paper servicing the motion picture industry, and by Charles Champlin, the Entertainment Editor for the Los Angeles Times, and in each instance the opinion was expressed that it had artistic merit.

V

The claimant asserts that it intends to exhibit the motion picture film "Quiet Days in Clichy" to consenting adults only, under circumstances which do not invade the privacy or sensitivities of the general public. Claimant also asserts that it intends to advertise the film in good taste.

VI

Henry Miller, the author of the book "Quiet Days in Clichy", is one of America's well known living writers. His workers, while highly controversial and disturbing to many people, concededly have social value. His most popular book, "Tropic of Cancer", has been found to be not obscene by the United States Supreme Court (*Grove Press v. Gerstein*, 378 U.S. 577) and the California Supreme Court (*Zeitlin v. Arnebergh*, 59 C.2d 901, 383 P.2d 152, 31 Cal. Rptr. 800 (1963)). At the present time, a film entitled "Tropic of Cancer" is being exhibited in many parts of the country including Los Angeles. The film is based on the book "Tropic of Cancer" and contains the "tabu" words found in the book.

VII

There are many motion picture films being exhibited today in many parts of the nation dealing with sex and nudity and using all of the "tabu" words. Many of these films go beyond "Quiet Days in Clichy" in sexual explicitness and nudity, and others equal "Quiet Days in Clichy" in their use of language.

VIII.

The Court is unable to determine whether or not the film "Quiet Days in Clichy" goes substantially beyond customary limits of candor in the nation as a whole in the depiction or representation of matters pertaining to sex, nudity or excretion.

IX

Qualified, respectable experts have found that the film "Quiet Days in Clichy" has artistic merit and other social values. I am unable to find that it does not.

X

Bearing in mind the increasing frankness in society in matters pertaining to sex and nudity, and the possible artistic merit of the film "Quiet Days in Clichy", I find that the film appeals to the normal interest in sex and nudity which the average person has in such matters, and that it does not appeal to the prurient, *i.e.* shameful, morbid, interest of the average person.

CONCLUSIONS OF LAW

I

This Court has jurisdiction under 28 U.S.C. §1345 and 19 U.S.C. §1305.

II

The film "Quiet Days in Clichy" is not obscene; on the contrary, it is protected by the free speech and press provisions of the First Amendment to the United States Constitution. *Jacobellis v. Ohio,* 378 U.S. 184; *Schackman v. California,* 388 U.S. 454; *Memoirs v. Massachusetts,* 383 U.S. 413; *United States v. A Motion Picture Entitled "I Am Curious-Yellow"*, 404 F. 2d 196 (1968); *United States v. One Carton "491"*, 367 F. 2d 889; *United States v. A Motion Picture Film Entitled "Without a Stitch"*, (CD Cal. 69-2041-AAH).

III

Claimant is entitled to a judgment ordering the Marshall to deliver to claimant the ten reels of film consisting of two prints of "Quiet Days in Clichy."

DATED: This 9 day of July, 1970.

/s/ William P. Gray
UNITED STATES DISTRICT
JUDGE